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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/555,276	11/02/2005	Richard Jeffery	36-1926	4593
23117 7590 07/29/2008 NIXON & VANDERHYE, PC 901 NORTH GLEBE ROAD, 11TH FLOOR ARLINGTON, VA 22203				
EXAMINER				
ELPENORD, CANDAL				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/555,276

**Applicant(s)**

JEFFERY ET AL.

**Examiner**

CANDAL ELPENORD

**Art Unit**

2616

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on May 07, 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-18 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-18 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 02 November 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-8508)
- Paper No(s)/Mail Date 23 January 2006
- 4) ☐ Interview Summary (PTO-413)
- Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

***Response to Arguments***

1. Applicant's arguments with respect to claim 1-18 have been considered but are moot in view of the new ground(s) of rejection.
2. Claims 1, 10 have been amended.

***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. **Claims 10-18** are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claims 1, 3, 10, 13 the phrase "capable of" renders the claim indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. See MPEP § 2173.05(d).

Claims 2, 4-9, 11, 14-18 are rejected due to their dependency on claims 1, 10 respectively.

***Claim Rejections - 35 USC § 102***

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States

only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

6. Claims **1-3, 6-12, 15-18** are rejected under 35 U.S.C. 102(e) as being anticipated by Leighton et al (US 7,111,061 B2).

**Regarding claims 1, 10,** Leighton '061 discloses method/ system (fig. 2, to fig. 4, see the system comprising plurality of data centers for providing content delivery of media stream to requested clients, col. 3, lines 65 to col. 4, lines 9) for selecting a preferred data provider (see, "request data at data centers by client", col. 2, lines 30-35) from a plurality of data providers (see, "multi content providers at data centers", col. 2, lines 19-28, see, fig. 2, Data Center 203a and 203b where content providers are situated, col. 5, lines 4-14), the system comprising: means for receiving a request for data from a client (see, "user's request for content web provider's website", col. 3, lines 5-10, fig. 1 to fig. 4, End Users 106, 107, col. 4, lines 33-41); means for receiving client identification data (see, "the end user's local server name 404 issues a request to the authoritative server", col. 7, lines 55-60) from said client (fig. 1 to fig. 4, End Users 106, 107, col. 4, lines 33-41); means for identifying a plurality of data providers (see, "core point used to identify local servers associated with data centers, col. 2, lines 24-28, see, determining core points using discovery, col. 5, lines 25-43) capable of providing data to said client (fig. 1 to fig. 4, End Users 106, 107, col. 4, lines 33-41); means for providing said client identification data to said data providers (see, the information collected during the core point discovery process is fed to servers, col. 5, lines 36-42); means for instructing said data providers to perform the following steps without requiring said client to install or execute additional software at said client (noted: the method for directing the

end users to appropriate data centers without having the client runs or installs software, abstract, lines 1-5, col. 1, lines 67 to col. 2, lines 10) (i) sending a test signal to said client (see, executing of a trace route from each of the data centers to a local server that may be used by the client, col. 5, lines 44-59, col. 6, lines 1-20, see ping packets sent to measure performance, col. 6, lines 48-67); (ii) receiving a return signal from said client (see, the network agent provides the performance information collected to the servers, col. 7, lines 24-38); (iii) obtaining a measure of the elapsed time (see, "estimated/measured round trip time (RTT)", col. 2, lines 46-54, col. 6, lines 58-67) between the sending of the test signal (see, executing of a trace route from each of the data centers to a local server that may be used by the client, col. 5, lines 44-59, col. 6, lines 1-20, see ping packets sent to measure performance, col. 6, lines 48-67) and the receipt of the return signal (see, return of set of IP addresses generated based on network maps created by testing the performance to the end user, col. 7, lines 63 to col. 8, lines 7); (iv) making a signal indicative of the elapsed time available to the system (see, the network agent provides the performance information collected to the servers, col. 7, lines 24-38); and v) making a signal indicative of their remaining capacity available to the system (see, traffic redirection system that does load balancing, directing the end users to a network replica that is not overload, abstract, col. 2, lines 1-8); means for receiving elapsed time signals and remaining capacity signals (see, identifying of network traffic conditions, congestion that may effect connectivity at a data center, col. 5, lines 38-42) from said data providers (see, "multi content providers at data centers", col. 2, lines 19-28, see, fig. 2, Data Center 203a and 203b where

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content providers are situated, col. 5, lines 4-14); means for selecting a preferred data provider on the basis of said signals (see, using the result of the ICMP probes to help the end user chooses the web server having the best quality, col. 8, lines 41-57); and means for providing information relating to the identity of said preferred data provider to said client (see, handing out the requesting end user the IP addresses of the optimal data center, col. 7, lines 40-45).

**Regarding claims 2, 11,** Leighton '061 discloses a system (fig. 2, to fig. 4, see the system comprising plurality of data centers for providing content delivery of media stream to requested clients, col. 3, lines 65 to col. 4, lines 9), wherein the means for receiving a request (see, "user's request for content web provider's website", col. 3, lines 5-10, fig. 1 to fig. 4, End Users 106, 107, col. 4, lines 33-41) for data comprises means for receiving a request for one or more specific items (see, "web content, streaming media and applications", col. 4, lines 1-7).

**Regarding claims 3, 12,** , Leighton '061 discloses a system (fig. 2, to fig. 4, see the system comprising plurality of data centers for providing content delivery of media stream to requested clients, col. 3, lines 65 to col. 4, lines 9), wherein the means for identifying data providers comprises means for searching for data providers capable of providing the specific item or items requested (see, "the requesting routing mechanism allocates the server to the requesting clients that provides the best service quality", col. 4, lines 9-22).

**Regarding claims 6,15,** Leighton '061 discloses a system (fig. 2, to fig. 4, see the system comprising plurality of data centers for providing content delivery of media stream to requested clients, col. 3, lines 65 to col. 4, lines 9), wherein the means for instructing said data providers is a means remote (see, fig. 3 to fig. 4, see, Authoritative Server 400 providing the end users with information (IP delegation), col. 4, lines 63-67) from the client (fig. 4, End-User 402, col. 7, lines 56-59).

**Regarding claims 7, 16,** Leighton '061 discloses a system (fig. 2, to fig. 4, see the system comprising plurality of data centers for providing content delivery of media stream to requested clients, col. 3, lines 65 to col. 4, lines 9), wherein the means for providing information relating to the identity of the preferred data provider (see, handing out the requesting end user the IP addresses of the optimal data center, col. 7, lines 40-45, see, "the requesting routing mechanism allocates the server to the requesting clients that provides the best service quality", col. 4, lines 9-22) is arranged to provide said information on a web site (see, "directing users to the best performing web site of the content delivery network", col. 4, lines 34-45).

**Regarding claims 8, 17,** Leighton '061 discloses a system (fig. 2, to fig. 4, see the system comprising plurality of data centers for providing content delivery of media stream to requested clients, col. 3, lines 65 to col. 4, lines 9), wherein the means for providing information relating to the identity of the preferred data provider is arranged to

provide the Uniform Resource Locator (URL) of said preferred data provider (see, "directing users to the best performing web site of the content delivery network", col. 4, lines 34-45-noted the website is synonymous with the URL).

**Regarding claims 9, 18,** Leighton '061 discloses a system (fig. 2, to fig. 4, see the system comprising plurality of data centers for providing content delivery of media stream to requested clients, col. 3, lines 65 to col. 4, lines 9), comprising means capable of selecting more than one preferred data provider (see, allocating of the servers in data centers that provides the best quality to a requesting end user for web content, streaming media, and applications, col. 4, lines 1-20) according to predetermined criteria (see, estimated predicted actual download times, col. 2, lines 46-51, col. 8, lines 42-57), and means for providing information relating to the identity of each preferred data provider to the client (see, handing out the requesting end user the IP addresses of the optimal data center, col. 7, lines 40-45, see, "the requesting routing mechanism allocates the server to the requesting clients that provides the best service quality", col. 4, lines 9-22).

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 103***

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the



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invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148

USPQ 459 (1966), that are applied for establishing a background for determining

obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

9. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

10. **Claims 4-6, 13-14** are rejected under 35 U.S.C. 103(a) as being unpatentable over Leighton et al (US 7,111,061 B2) in view of Yahagi et al (US 2002/0102978 A1).

Leighton '061 discloses the system as set forth in claims 1, 10 above.

Leighton '061 is silent with respect to claimed features:

**regarding claims 4, 13**, select a preferred data provider from data providers having a remaining capacity above a predetermined threshold, **regarding claims 5, 14**,

wherein the means for instructing said data providers comprises means for instructing the data providers to make available to the system a signal indicative of their remaining bandwidth.

However, Yahagi '978 from the same field of endeavor discloses the above claimed features:

**Regarding claims 4, 13,** select a preferred data provider ("allowing a user to select one of the networks based on response signals", recited in paragraph from data providers (fig. 1, different service providers", recited in paragraph 0024) having a remaining capacity above a predetermined threshold ("congestion level below a predefined threshold", recited in paragraph 0013).

**Regarding claims 5, 14,** means for instructing ("directing the wireless interface", recited in paragraph 0025) the data providers (fig. 1, different service providers", recited in paragraph 0024) to make available to the system a signal indicative of their remaining bandwidth ("traffic handling capacity and traffic level", recited in paragraphs 0027-0028).

In view of the above, having the system for content delivery of media stream based on the load of Leighton '061, the multi-network communications system that allows end user to select a network provider based on the response signals received, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the features of Leighton '061 by using features as taught by Yahagi '978 in order to provide differential services based on response signals as suggested in paragraphs 0006-0008 for motivation.

***Conclusion***

11. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Dziekan et al (US 6,704,288 B1) and Lisiecki et al (US 7,340,505 B2).

12. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to CANDAL ELPENORD whose telephone number is

(571)270-3123. The examiner can normally be reached on Monday through Friday 7:30AM to 5:00PM EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kwang Bin Yao can be reached on (571) 272-3182. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Candal Elpenord/  
Examiner, Art Unit 2616

/Kwang B. Yao/  
Supervisory Patent Examiner, Art Unit 2616